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IN THE

SUPREME COURT OF THE UNITED STATES

OCT. TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LE ROY TEALE,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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printed by CALIFORNIA OFFICE OF STATE PRINTING

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The original opinion of the California Supreme Court was set forth in 63 A.C. 175. A modification was set forth in 63 A.C. 269. The opinion as modified is reported in 63 Cal.2d 178, 404 P.2d 209, 45 Cal. Rptr. 729.

The various opinions are set forth in Appendices A, B, and C of the brief for petitioners.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28 Sec. 1257(3) United States Code.

The judgment of the Supreme Court of the State of California was entered on July 16, 1965. Timely petitions for rehearing were filed by each petitioner, Chapman and Teale. The opinion of the California Supreme Court was modified and each petition for rehearing was denied on August 27, 1965.

A timely petition for writ of certiorari was filed in this Court. A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 28, 1966, in 875 Misc. O.T. 1965. A stay of Mr. Teale's death sentence was granted by Mr. Justice Douglas pending the outcome of this proceeding.

STATUTES INVOLVED

The pertinent statutes and constitutional amendments, both state and federal are set forth in the Appendix hereto.

QUESTIONS PRESENTED

The questions set forth by this Court in its grant of certiorari are:

Where there is a violation of the rule of *Griffin* v. *California*, No. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?

STATEMENT OF THE CASE

Petitioners Ruth Elizabeth Chapman and Thomas L. Teale were convicted after a jury trial at which they were represented by separate counsel of the first degree murder of Billy Dean Adcock, robbery of the

first degree and simple kidnapping.[1] A life sentence was imposed upon petitioner Chapman as to the murder count (CT 347–349). The death penalty was imposed upon petitioner Teale (CT 343–346). After an automatic appeal pursuant to the provisions of

[1] Chronology of Proceedings in Trial Court:

On October 26, 1962, Mrs. Chapman was arrested in St. Joseph, Missouri, pursuant to a fugitive warrant (CT 18a, 58; RT 1037). She waived extradition and was voluntarily returned to California, leaving Missouri on October 28 (CT 58; RT 1054). On October 31, 1962, she was arraigned in the Lodi Judicial District Court on a complaint charging her with murder, robbery and kidnapping (CT 29). John L. Briscoe, public defender of San Joaquin County, was appointed to represent her (CT 29–30).

On November 2, 1962, Thomas Teale was arrested in New Orleans, La. (RT 1123). He was turned over to the custody of California officers on November 8, 1962 (RT 1064). He was returned to California and on November 13, 1962, was arraigned in the Lodi Judicial District Court and John L. Briscoe, public defender of San Joaquin County, was appointed to represent him (CT 30).

On November 16, 1962, the Grand Jury of San Joaquin County returned an indictment against Mrs. Chapman and Mr. Teale charging them with the same offenses on which they had previously been charged and arraigned in the Justice Court (CT 1a–2b). They were arraigned in the Superior Court on this indictment on November 21 and John L. Briscoe, public defender was again appointed to represent them (CT 2a, 3a, 3b).

On December 11, they entered pleas of not guilty to each count of the indictment and waived time for trial (CT 3d, 4a, 5a). February 5 was set for the trial date (CT 3d, 4a).

On January 29, 1963, the public defender presented a motion to withdraw as counsel for petitioner Chapman on the ground of a conflict of interest between her and petitioner Teale, which was granted (CT 4, 7a, 8a). The trial date was then set for March 19, 1963 (CT 4, 23a, 24a, 82a, 83a). On February 5, 1963, Richard Johnson was appointed as counsel for petitioner Chapman and Thomas Krehbiel was associated with him (CT 5, 14a, 15a). A motion for discovery was filed by counsel for petitioner Chapman and granted (CT 5, 25).

On February 14, 1963, petitioner Chapman filed a motion for separate trials on the ground that Mr. Briscoe who was now

section 1239b[2] of the California Penal Code, the judgment for murder as to petitioner Chapman was affirmed but insofar as the judgment imposed punishment for the robbery and kidnapping counts, lesser crimes, it was reversed (Calif. Pen. Code § 654).[3] The judgment as to petitioner Teale was affirmed in all respects since the death penalty was imposed and he could not be therefore affected by the multiple sentencing (*People v. Teale and Chapman*, 63 Cal.2d 178, 404 P.2d 209, 45 Cal.Rptr. 729).

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representing petitioner Teale had been her counsel for a period of 91 days, had received confidential communications from her and their interests were now in conflict (CT 29–37, 41). The motion for separate trial was denied but the court granted the motion for the public defender, Mr. Briscoe, to be relieved as counsel for petitioner Teale and Nels Fransen was appointed as his counsel (CT 58a–59a, 63a, 64a, 60–61).

Counsel for petitioner Teale then made a motion to withdraw Teale's plea of not guilty for the purpose of moving to set aside the indictment and moved to set aside the indictment (CT 62–67, 85a–99a). Both motions were denied (CT 78–79, 99a). Counsel for Teale filed a motion for continuance for 30 days to permit him to prepare for trial. This motion was granted and the trial date set over to April 16, 1963 (CT 78–79, 111a).

Meanwhile on March 6, 1963, petitioner Chapman filed a petition for writ of mandate with the Third District Court of Appeal, 3 Civil 10673, to compel the trial to proceed on March 19 (CT 352–393). This petition was denied (CT 458).

On March 19, 1963, petitioner Teale sought a writ of prohibition from the Third District Court of Appeal to prohibit the trial on the ground of lack of reasonable and probable cause to support the indictment (3 Civil 10679; CT 433–467). This was denied (CT 92).

On April 2, 1963, petitioner Chapman filed a petition for writ of prohibition with the Third District Court of Appeal, 3 Civil 10688 to halt the trial for alleged failure to accord her a speedy trial (CT 394–432). This was denied on April 4, 1963 (CT 459) and the trial proceeded beginning April 16, 1963 (CT 94).

[2] See Appendix.
[3] See Appendix.

On October 17, 1962, petitioners registered at a motel in Fresno, California, where they gave a bad check in payment of their room rental (RT 769–770, 773, 1256). At approximately 10 p.m. on that same day they entered Croce's Tavern near Lodi, California, where they remained for nearly three hours and together consumed five bottles of beer (RT 776–777, 781, 783–4, 802, 828). Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here", or "We can't do anything here, let's go" (RT 783, 784, 814). They then left the tavern together (RT 781, 784). They were not drunk (RT 784, 812, 828).

Petitioners next appeared the following morning at about twenty minutes to two at the "Spot Club" in Lodi (RT 841, 860). At about ten minutes to two when the bar clock showed two o'clock and closing time, they were the only persons left in the bar with the bartender Adcock (RT 845, 846, 863). Shortly after closing time, 2 a.m., three persons, including the bartender and a woman of Mrs. Chapman's general description were observed in front of the Spot Club (RT 887, 891, 892). The third person in the group, a man resembling the petitioner Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern (RT 887, 891).

The following morning the owner of the bar found it to be in unusual disarray (RT 906, 907, 974, 988, 997). The cash register had been broken into and ap-

proximately $260 was missing (RT 985, 987, 994, 998–999). Papers usually kept in the register were scattered about the floor (RT 988). Routine housekeeping tasks which the bartender generally completed before leaving had not been performed (RT 974, 997, 1001–1002, 1004, 1005).

Later that morning, October 18, 1962, at about 9:30 a.m., the victim's body was found in a remote area north of Lodi (RT 922, 928). It was half submerged in an open ditch by the side of the road (RT 924). The clothing was torn and there was blood on the face and on the surface of the road nearby (RT 934–5). The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches (RT 713–714, 720, 723). The third bullet entered the back of the head from a gun held some 18 inches away (RT 723). The time of death from the gunshot wounds was estimated at 3:00 o'clock on the morning of the 18th (RT 724).

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the petitioner Chapman in Reno, Nevada, while there with Teale six days before the killing (RT 752–756, 760–764, 1284–1286).

Neither the gun which she purchased nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been re-

moved and a check for $2 bearing a stamp "Refer to Maker", which had been signed by Mrs. Chapman (RT 898, 939, 946, 947, 948; Peo. Exh. 33, RT 946).

Evidence connecting petitioners with the commission of the crime was submitted by an expert witness for the People who testified that the victim's blood was Type A (RT 1308); that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of petitioner's vehicle (RT 1308, 1318–1323, 1324–1325); that blood had spattered or radiated out from the right front side of the automobile (RT 1318–1323); that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession (RT 1297, 1298, 1300, 1301–1302, 1328); that Type A blood was also found on petitioner Teale's shirt and jacket (RT 1302, 1303–5); that numerous fibers taken from the victim's shoes matched those found in the petitioner's automobile (RT 1351–1356); that hairs were found in the automobile which matched those of the victim (RT 1358); that red paint found on the floor mat of the petitioner's automobile came from the shoes of the victim (RT 1358–1362); and that in the opinion of the expert criminologist the victim had been in the petitioner's automobile (RT 1363).

Petitioner Teale was arrested in New Orleans on November 2, 1962, by the FBI on a fugitive warrant (RT 1123, 1125). While he was being booked and photographed in the FBI office after being told of

the charges against him and after having been advised of his rights to an attorney, that he did not have to furnish any information and anything he said could be used against him (RT 1125) Teale stated: "Well, they'll have a hard time proving I was there" (RT 1139).

At the time of his arrest, Teale carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she had purchased the .22 caliber weapon previously mentioned and he was driving the automobile which had been in petitioner's possession before and at the time of the killing (RT 744, 752–756, 760–764, 1125–1126).

After his return to California, Teale was confined with one Waldo Vowel, another prisoner who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet" (RT 1431). Later, the witness testified he had another conversation with Teale in the prison yard: "I told him I knew Bill (the deceased), and he (Teale) told me he didn't plan for it to happen that way, and he started relating to me how it happened [RT 1431–2]. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him [RT 1432]. But he said when they pulled up and stopped, that he opened the

door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around —go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times" (RT 1432). Teale further stated, according to the witness, that "they" could never find the gun (RT 1432–1433). In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years" (RT 1435).

Mrs. Chapman was arrested by an agent of the FBI in St. Joseph, Missouri, on October 26, 1962 (RT 1037). At the time she was arrested pursuant to a fugitive warrant she was at the home of Alberta Smith, a sister of petitioner Teale (RT 1037). The officers took her personal effects as well as those she had at the residence where she was apprehended (RT 1038–9, 1043). She was temporarily lodged in the jail in St. Joseph (RT 1038).

On October 28, 1962, the Lodi police officers and a matron took her in custody (RT 1054). Mrs. Chapman

waived extradition and voluntarily returned with the officers to California (CT 58; RT 1054).

During the time she was questioned by the FBI she answered as to her activities prior to leaving California. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph (RT 1724–1725). She later stated to them that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco (RT 1726).[4]

It was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland, Califorina, at 4:40 a.m. on October 18th was made out in her handwriting (RT 1016–1021; Peo. Exh. 46). The clerk of the motel also testified that the registrant gave a false license number and that the parties arrived in an automobile which was the one found in Teale's possession at the time of his arrest in Louisiana (RT 1016–1021).

Mrs. Teale also denied that she suffered from blackouts when she spoke to the FBI agent in St. Joseph (RT 1724–6).

Mrs. Chapman's defense was to the effect that she was incapable of forming an intent during the period in question and hence she could not have been guilty of the offenses. She did not take the stand but produced this defense through a psychiatrist who ex-

[4] These statements were elicited from the FBI agent on direct examination when called as petitioner Chapman's witness (RT 1724–6).

pressed his opinion that she suffered a hysterical alcoholic type of amnesia; that she underwent a "dissociative reaction" (she blacked out by simply not knowing) and he placed the point of inception of this state at the time of petitioner Chapman's alleged beating by petitioner Teale outside of the Croce bar in Lodi (RT 1557, 1579, 1580). She also introduced evidence through her past employers and her daughter as to an alleged mental breakdown in the past and her previous drinking habits (RT 1702–3, 1704–5, 1707–8, 1745–6, 1747–8, 1749, 1783, 1784–5, 1791).

In rebuttal the prosecution called a psychiatrist who examined Mrs. Chapman and was of the opinion that she could have had an attack of amnesia but that if this had occurred, it took place at the time the shot was fired which was after the time the robbery had been committed and that prior to that time she was capable of forming an intent (RT 1769–1773).

Neither petitioner took the stand to testify.

During the argument the prosecution commented on numerous occasions regarding the failure of either petitioner to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman (RT 1808–9, 1826–7, 2106, 2115–6); funds or the lack thereof in Mr. Teale's possession immediately prior to the killing (RT 1824–1825); the amount of intoxicating liquors consumed by petitioners at the Spot Club and other taverns (RT 1838); the circumstances of the shooting in the auto-

mobile (RT 1840–1841); the removal of the victim's body from the automobile (RT 1822–3, 1860–1861); who fired the fatal shots (RT 1840–1841, 2256); why petitioners used a false registration at a motel shortly after the killing (RT 1844–5, 1846); the meaning of a letter written by Mrs. Chapman several days after the killing (RT 1848, 1849); why Teale had a loaded weapon in his possession when apprehended (RT 1854–1855); the meaning of statements made by Teale after his apprehension (RT 1855); why certain clothing and articles of personal property were shipped by petitioners to Missouri (RT 1861, 1862–3, 1864); what clothing Mrs. Chapman wore at the time of the killing (RT 1882); conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing (RT 1889); and generally, the overall commission of the crime (RT 1809, 1822–3, 1826, 1827, 1829, 1881, 1882, 1883, 1886, 2257, 2258, 2288).

The court in its instruction to the jury and in accordance with the California constitutional provision (Cal. Const. Art. I, § 13) [5] stated, among other things, that the failure of petitioners to testify from facts within their knowledge in explanation of incriminating evidence may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (CT 204–5; RT 2162–2163).

[5] See Appendix.

SUMMARY OF ARGUMENT

A violation of the comment rule as enunciated by this Court in *Griffin* v. *California*, 380 U.S. 609, in a case tried prior to the *Griffin* decision does not constitute prejudicial error per se. The application to such a situation of California's harmless error rule, which meets federal standards, neither constitutes a denial of due process of law nor a patent disregard of this Court's decisions. California's harmless error rule was properly applied to the facts of the case where the evidence of guilt was overwhelming.

ARGUMENT

I. A Violation of the Comment Rule in a Case Tried Prior to the Decision in *Griffin* v. *California*, 380 U.S. 609, Does Not Warrant a Reversal But Such Error May Properly Be Saved by the Application of a State Harmless Error Rule

A. A Violation of the Comment Provision Is Not Prejudicial Error Per Se Warranting a Reversal

In *Twining* v. *New Jersey* (1908) 211 U.S. 78, 90–91, 29 S.Ct. 14, 53 L.Ed. 97, the court assumed that the comment involved infringed the federal privilege against self-incrimination but held that the Fourteenth Amendment did not require the states to grant that privilege. *Adamson* v. *California* (1947) 332 U.S. 46, 50, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223, was a case where the court again assumed that the comment would violate the privilege but followed *Twining* in holding that the Fifth Amendment was not binding upon the states. *Malloy*

v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, overruled the two previous cases and applied the Fifth Amendment to the states through the Fourteenth. To the same effect was *Murphy* v. *Waterfront Com.* (1964), 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678.

Griffin v. *California* (1965), 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229, held that the limited comment rule provided for by the California Constitution, Article I, section 13, violated the Fifth Amendment and that the instruction based thereon (CALJIC 51 Rev.) was error. With respect to California's limited comment rule, this Court stated:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. . . ."

(14 L.Ed.2d 106, 109–110.) The question of retroactivity of this decision was not discussed in *Griffin*. However, in *Tehan* v. *Shott* (1966), 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453, the court held that the *Griffin* doctrine would not be applied retroactively. It applied the same test with respect to retroactiveness that it had adopted with relation to illegally obtained evidence in *Linkletter* v. *Walker* (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601. That is, the court held the rule of *Griffin* would not be applicable to those cases in which the judgment of conviction was rendered, the availability of appeal exhausted and the time for petition for certiorari elapsed or a

petition for certiorari finally denied before April 28, 1965, the date of the *Griffin* decision.

Although the conviction in the case at bar was obtained in 1963, the processes on direct appeal had not been completed prior to *Griffin* and hence the *Griffin* rule would apply save for the application of a harmless error rule.[6]

Tehan v. *Shott,* 382 U.S. 406, *supra,* affirmed the principle that one of the basic tenets that underlie the privilege against self-incrimination was the preservation of the "integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'." The prosecution in the case at bar shouldered the entire load which must be done in all California cases (*People* v. *Bostick,* 62 Cal.2d 820, 44 Cal.Rptr. 649, 402 P.2d 529).

Petitioners urge that any comment contrary to *the Griffin doctrine* warrants a reversal per se and attempt to equate the use of such prohibited comment with cases relating to the introduction of involuntary or coerced confessions or cases involving a denial of the right to counsel. In the involuntary or coerced confession cases relied upon by petitioner the court has held that such confessions tainted the entire proceedings and the error was so fundamental that it

[6] In this respect it should be noted that no charge of bad faith or a flaunting of the court's rulings may be attributed to the prosecution. The action of the prosecution was proper under California law and decisions of this Court at the time it was taken although later developments of the law have rendered it erroneous.

would not be wiped from the jury's mind as a man's confession was the strongest evidence of guilt. (*Bram* v. *United States* (1897), 168 U.S. 532, 42 L.Ed. 568, 18 S.Ct. 183; *Moore* v. *Dempsey* (1923), 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265; *Chambers* v. *Florida* (1939), 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472; *Faye* v. *Noia* (1963), 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822; *Massiah* v. *United States* (1964), 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199; *Escobedo* v. *Illinois* (1964), 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758.) By the use of such involuntary confessions it could be possible that the guilt-determining process was unreliable and an innocent individual would be punished.

The same principle would permeate those cases in which a defendant was not afforded his right to counsel which precluded him from having a fair trial or a direct appeal (*Gideon* v. *Wainwright* (1963), 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 747; *Douglas* v. *California* (1963), 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814).

The principles set forth in these cases have been retroactively applied except for those involving the *Escobedo* principles on the ground that these constitutional errors were of such gross magnitude that they infected the entire proceedings and presented a clear danger of convicting the innocent, hence a violation of either principle denied a defendant his day in

court and did not accord with the standards of American justice.

Such reasoning, however, should not be attributed to a violation of the comment provision. It does not render the guilt-determining process unreliable nor would it cause an innocent individual to be punished. It is merely a way of directing the jury's attention to the self-evident facts.

This court in its prior decisions has indicated that it will not reverse for every acknowledged constitutional error even though some may have related to comment or even alleged denial of counsel.

For example, in *Snyder* v. *Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575, it was held that the fact that the defendant was absent from such a minor portion of the proceedings against him did not result in prejudice. Again, in *Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704, it was held that comment on the defendant's reliance on his privilege against self-incrimination was error but the error had been waived. This was not a declaration that the error was nonprejudicial but an indication that a denial of due process is not always reversible error per se.

Wilson v. *United States* (1893), 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650, was reversed because of the prosecutor's comment on the defendant's failure to take the stand as a witness. The comment was held to be error specifically for the reason that a federal

statute provided that no presumption shall be created against defendant by reason of his decision not to testify.

There this court used the following language:

> "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases *where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause.*" (Italics added.)

To the same effect see *Coleman* v. *Denno* (D.C. S.D. N.Y. 1963), 223 F.Supp. 938, affirmed in *United States* v. *Denno* (2d Cir. 1964), 330 F.2d 441; *United States* v. *Knox Coal Co.* (3d Cir. 1965), 347 F.2d 33; *Cloud* v. *United States* (8th Cir. 1966), 361 F.2d 627.

It would thus appear that in not every case has an alleged constitutional error warranted a reversal per se.

B. The Harmless Error Rules

All fifty states, the District of Columbia and the federal courts have harmless error rules. They are but a recognition of the fact that human beings are fallible and that a defendant is entitled to a fair trial but not a perfect one.

Prior to the adoption of legislation on the subject by Congress, the harmless error rule in federal criminal cases as defined by case law held that error required reversal unless the opposing party could

affirmatively demonstrate that it was harmless (*Rich* v. *United States* (CA8 1921), 271 F. 566; *Hall* v. *United States* (1921), 277 F. 19). The same situation pertained in California prior to 1911 the date of the adoption of Article VI, section 4½ of the Constitution even though the statutes had provided that judgments should not be reversed because of technical errors or defects which did not affect the substantial rights of the defendants (Calif. Pen. Code §§ 1258, 1404).[7] The California courts prior to 1911 in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error.[8]

On February 26, 1919, the federal harmless error rule was embodied in legislation.[9] Judicial Code, section 269, was amended at that time by the addition of the second sentence which provided that:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This court stated in *Kotteakos* v. *United States* (1946), 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239,

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[7] See Appendix.

[8] *People* v. *Williams*, 18 Cal. 187, 194; *People* v. *Murphy*, 47 Cal. 103, 106; *People* v. *Stanley*, 47 Cal. 113, 119 (17 Am. Rep. 401); *People* v. *Furtado*, 57 Cal. 345, 347; *People* v. *Sansome*, 84 Cal. 449, 451, 24 P. 143; *People* v. *Moore*, 103 Cal. 508, 511, 37 P. 510; *People* v. *Richards*, 136 Cal. 127, 68 P. 477.

[9] Act of February 26, 1919, C. 48, 40 Stat. 1181.

that the purpose of section 269 of the Judicial Code was to substitute judgment for automatic application of rules and to preserve review as a check upon arbitrary action and essential unfairness in a trial. At the same time, it was to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, would engender and reflect in a printed record. In enacting this section, Congress intended to put an end to the too rigid application of the rule that error being shown, prejudice is presumed, and to establish a more reasonable rule that if upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. The crucial thing was the impact of the thing done wrong on the minds of other men in the total setting. The test adopted was what effect the error had or reasonably may be taken to have had upon the jury's decision.

In 1948, Congress effected a substantial revision of Titles 18 and 28 of the United States Codes. In Title 18, Rule 52 of the Federal Rules of Criminal Procedure, harmless error is defined: "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded" and plain error is defined as "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In 1949, section 2111 of Title 28 was enacted to provide that "on the hearing of any appeal or writ of

certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." [10]

It thus appears that under the federal harmless error rule it is generally the case that prejudice will not be presumed from error in the record but that the party urging reversal because of error must show prejudice. Where, however, error does occur in a criminal case, which within the range of reasonable possibility, may have affected the verdict of the jury, the defendant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence the verdict, and if the record fails to disclose this, the verdict may not stand. A defendant may not however wait for a court to consider errors of its own motion (*United States* v. *Kolakowski* (4 Cir. 1963), 314 F.2d 699).

In this field, however, it must be remembered that the federal courts are acting under the federal supervisory power as well as the federal statutes.

The California harmless error rule is contained in Article VI, section 4½ of the California Constitution which was adopted in 1911 to apply to criminal cases and amended to apply to civil cases in 1914. It reads:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection

[10] By this statute Congress sought to make certain that the existing law as to harmless error would be applied by the federal appellate courts (1949 U.S. Code and Congressional Service, p. 1272).

of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

With the advent of this section, California courts no longer followed the concept that prejudice would be presumed from error and that it warranted reversals. Now the appellate courts were to determine whether such error, if it occurred, resulted in a "miscarriage of justice." To accomplish this result the appellate court was required to review the evidence so as to form an "opinion" as to whether the assigned errors had affected the outcome of the case and hence resulted in a "miscarriage of justice."

In determining the meaning of this phrase "miscarriage of justice" the courts of California have stated the test to be applied in varied language. Emphasis has been placed on the constitutional requirements of a fair trial and due process.[11]

[11] Cf. *People* v. *Saraszawski*, 27 Cal.2d 7, 11, 161 P. 2d 934; *People* v. *Mahoney*, 201 Cal. 618, 627, 258 P. 607; *People* v. *Hall*, 199 Cal. 451, 458, 249 P. 859; *People* v. *Kelso*, 25 Cal.2d 848, 852-853 155 P.2d 819; *People* v. *Gonzales*, 24 Cal. 2d 870, 877, 151 P.2d 251; *People* v. *Carnine*, 41 Cal.2d 384, 392, 260 P.2d 16; cases collected in "Appellate Review of Criminal Convictions on Appeal," 43 Cal.L.Rev. 381; *People* v. *Cotter*, 63 Cal.2d 386, 46 Cal.Rptr. 622; 405 P.2d 862; *People* v. *Jacobson*, 63 Cal.2d 319, 329, 46 Cal.Rptr. 515, 405 P.2d 555; *People* v. *Mitchell*, 63 Cal. 2d 805, 48 Cal.Rptr. 371, 409 P.2d 211; *People* v. *Failla*, 64 A.C. 613, 620, 51 Cal.Rptr. 103, 414 P.2d 39; *People* v. *Talbot*, 64 A.C. 751, 771, 51 Cal.Rptr. 417, 414 P.2d 633.

In *People* v. *Watson*, 46 Cal.2d 818, 299 P.2d 243, the California Supreme Court restated its test in the following language:

> "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."
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> * * * * * *
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> "Nevertheless, the test as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated."

By the use of the term "reasonable probabilities" and the rejection of the term "mere possibilities" the California court did not deviate from the standard enunciated by this Court in *Fahy* v. *Connecticut* (1963), 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171, which reversed a conviction for the admission of illegally obtained evidence without consideration of whether a state harmless error rule or a federal one should have been utilized. There the court stated, 375 U.S. p. 86:

> "We are not concerned here with whether there was 'sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'"

It is apparent that the California courts have equated this *Fahy* standard with that adopted by California and have considered the phrases as having the same meaning (*People* v. *Jacobson*, 63 Cal.2d 319, 331, 46 Cal.Rptr. 515, 405 P.2d 555; *People* v. *Cotter*, 63 Cal.2d 386, 398, 46 Cal.Rptr. 622, 405 P.2d 862; *People* v. *Mathis*, 63 Cal.2d 416, 434, 46 Cal.Rptr. 785, 406 P.2d 65).

There is no question but that California courts have applied their harmless error rule to alleged constitutional errors such as a violation of the comment rule in a myriad of both reported and unreported cases.[12] Virtually all of these cases were tried before the court's decision in *Griffin* v. *California*, 380 U.S. 609, *supra*, but the appellate processes had not been completed. There is no question but that in cases wherein the California courts were of the opinion that the now prohibited comment would have caused a "miscarriage

[12] *People* v. *Luckman*, 235 Cal.App.2d 75, 45 Cal.Rptr. 41; *People* v. *Parker*, 235 Cal.App.2d 100, 44 Cal.Rptr. 909; *People* v. *Davis*, 235 Cal.App.2d 214, 45 Cal.Rptr. 297; *People* v. *Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222; *People* v. *Daugherty*, 235 Cal.App.2d 564, 45 Cal.Rptr. 528; *People* v. *Propp*, 235 Cal.App.2d 619, 45 Cal.Rptr. 690; *People* v. *Erb*, 235 Cal.App.2d 650, 45 Cal.Rptr. 503; *People* v. *Estrada*, 236 Cal.App.2d 221, 45 Cal.Rptr. 904; *People* v. *Huggins*, 236 Cal.App.2d 578, 46 Cal.Rptr. 199; *People* v. *Butts*, 236 Cal. App.2d 817, 46 Cal.Rptr. 362; *People* v. *Collier*, 237 Cal.App.2d 259, 46 Cal.Rptr. 887; *People* v. *Fontaine*, 237 Cal.App.2d 320, 46 Cal.Rptr. 855; *People* v. *Boyden*, 237 Cal.App.2d 695, 47 Cal.Rptr. 136; *People* v. *Padilla*, 240 A.C.A. 115; *People* v. *Phillips*, 240 A.C.A. 206; *People* v. *Bowman*, 240 A.C.A. 360; *People* v. *Potter*, 240 A.C.A. 687; *People* v. *Culp*, 241 A.C.A. 445; *People* v. *Gills*, 242 A.C.A. 868; *People* v. *Romero*, 244 A.C.A. 564.

of justice" reversals were ordered.[13] Thus it is apparent that the section has been so applied by California courts that where there is a reasonable possibility of the constitutional error affecting the outcome of the case the courts have reversed and afforded full protection to the defendants.

Similar rulings have been had by other states such as Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Massachusetts, Montana, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Texas, Tennessee, Washington, and Wisconsin with relation to other types of constitutional errors which cases have been saved by the application of their harmless error rules.[14]

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[13] *People* v. *Keller*, 234 Cal.App.2d 395, 44 Cal.Rptr. 432; *People* v. *Sigal*, 235 Cal.App.2d 449, 45 Cal.Rptr. 481; *People* v. *Steele*, 235 Cal.App.2d 798, 45 Cal.Rptr. 601; *People* v. *Odom*, 236 Cal.App.2d 876, 46 Cal.Rptr. 453; *People* v. *Banks*, 238 A.C.A. 356; *People* v. *Staten*, 238 A.C.A. 601; *People* v. *Moore*, 239 A.C.A. 64; *People* v. *Davenport*, 240 A.C.A. 354; *People* v. *Mortenson*, 241 A.C.A. 173, 677.

[14] *Biele* v. *State* (Ala.) 371 P.2d 811 (self-incrimination); *State* v. *Carpenter* (Ariz.) 405 P.2d 460 (counsel); *Melton* v. *People* (Colo.) 401 P.2d 605 (illegally obtained evidence); *Casso* v. *State* (Fla.) 182 So. 2d 252 (illegally obtained evidence); *Kimmons* v. *State* (Fla.) 178 So. 2d 608 (illegally obtained evidence); *Shelly* v. *State* (Ga.) 132 S.E.2d 228 (illegally obtained evidence); *People* v. *Taylor* (Ill.) 204 N.E.2d 734 (counsel); *People* v. *Robinson* (Ill.) 211 N.E.2d 697 (counsel); *Commonwealth* v. *Palladino* (Mass.) 195 N.E.2d 769 (illegally obtained evidence); *State* v. *Sorenson* (Minn.) 134 N.E.2d 115 (illegally obtained evidence); *State* v. *Noble* (Mont.) 384 P.2d 504 (inadmissible evidence); *State* v. *Brown* (Mo.) 404 S.W.2d 179; *Dean* v. *Fogliani* (Nev.) 407 P.2d 580 (illegally obtained evidence); *State* v. *Wade* (N.J.) 214 A.2d 411 (counsel); *State* v. *Doyle* (N.J.) 186 A.2d 499 (illegally obtained evidence); *State* v. *Waldbillig* (Ohio) 203 N.E.2d 361 (illegally obtained evidence); *State* v. *Thomas* (Ore.)

California's harmless error rule was upheld as against a contention that it violated the Fourteenth Amendment in *People* v. *Cowan,* 44 Cal.App.2d 155, 159, 112 P.2d 162 and *Sampsell* v. *People of the State of California* (9 Cir. 1951), 191 F.2d 721, 726.

Even in states which prior to *Griffin* had not permitted the limited comment which was permitted by California courts questions have arisen as to what was forbidden comment. Judicial interpretation of what constituted forbidden comment varied. Traditionally it was recognized that the prosecuting attorneys might comment on the weight and sufficiency of the evidence. Now is the prosecutor to be restricted from making reference to this? Where the prosecuting attorney has commented that the evidence is uncontradicted and the nontestifying defendant is the only party who could contradict the evidence there has been a difference of opinion among the courts as to whether or not this has been an implied comment on the defendant's failure to testify.[15]

Hence it is apparent that even where there has been a previous recognition of comment as violating the defendant's privilege against self-incrimination, there

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400 P.2d 549 (admission of evidence); *Commonwealth* v. *Coyle* (Pa.) 203 A.2d 782 (counsel); *McCain* v. *State* (Tex.) 363 S.W.2d 257 (illegally obtained evidence); *State* v. *Moran* (Tenn.) 385 S.W.2d 912 (illegally obtained evidence); *State* v. *Craig* (Wash.) 406 P.2d 599 (exemplars); *Hemmis* v. *State* (Wis.) 129 N.E.2d 209 (illegally obtained evidence).

[15] *Desmond* v. *United States,* 345 F.2d 225, 227 (1st Cir.); *Lambert* v. *State,* 199 Miss. 780, 25 So.2d 477, 479–480; cf. *People* v. *McMahon,* 244 Ill. 45, 91 N.E. 104, 109; *Commonwealth* v. *Morrison,* 180 Pa. Super. 121, 118 A. 2d 258, 261.

has been no uniformity of opinion as to what constitutes such prohibited comment. Under such circumstances, it is readily apparent that harmless error rules have properly been applied by the states to save cases where the evidence of guilt is great and the error one that does not subvert the administration of justice.

It should be noted that in considering whether or not prohibited comment may be cured by a state harmless error rule, the failure of the defendant to testify is before the jury. Whether or not the court or prosecutor comments on such failure the jury will draw inferences therefrom. It will expect the defendant to present all the evidence he can to escape conviction and will naturally infer that his failure to explain or deny evidence against him when the facts are peculiarly within his knowledge arises from his inability to do so (*People* v. *Modesto,* 62 Cal.2d 436, 42 Cal.Rptr. 417, 398 P.2d 753). Such comment is not the type of error that pervades the entire trial so as to deny due process and a fair trial. It certainly should not be considered the type of error that is reversible per se (*In re Gaines,* 63 Cal.2d 234, 45 Cal.Rptr. 865, 404 P.2d 473). This court recognized the same principles when it stated in *Tehan* v. *Shott,* 382 U.S. 406, 416:

> "As in *Mapp,* therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intri-

cacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright,* 372 U.S. 335; *Doughty* v. *Maxwell,* 376 U.S. 202; *Griffin* v. *Illinois,* 351 U.S. 12; *Eskridge* v. *Washington Prison Board,* 357 U.S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno,* 378 U.S. 368; *McNerlin* v. *Denno,* 378 U.S. 575; *Reck* v. *Pate,* 367 U.S. 433. By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect."

See also *Wilson* v. *Rose* (9th Cir. 1966)—F.2d—, (Footnote 8).

In California, the limiting rules which surrounded the comment rule materially reduced the effect of the comment or instruction on the resolution of the case. Many years ago the California courts curtailed the effect of the comment rule by requiring instructions that defendant's failure to deny or explain evidence against him did not create a presumption of guilt or of the truth of the facts, that the prosecution was not relieved from its burden of proving every essential element of the crime and the defendant's guilt beyond

a reasonable doubt and that no inference could be drawn if defendant did not harbor the knowledge necessary to explain or deny the evidence against him (*People* v. *Adamson*, 27 Cal.2d 478, 489–493, 165 P.2d 3; CALJIC No. 51 (Rev.); *People* v. *Albertson*, 23 Cal.2d 550, 594–596, 145 P.2d 7 (Traynor, J. concurring); *People* v. *Sawaya*, 46 Cal.App.2d 466, 115 P.2d 1001; 34 Cal.L.Rev. 764; 32 Cal.L.Rev. 317).

Hence respondent submits that in light of the type of constitutional error considered here it is clearly proper that a state's harmless error rule should be applied to evaluate whether this error caused such a denial of due process as would cause state action to run afoul of the Fourteenth Amendment to the United States Constitution.

II. California's Harmless Error Rule Was Properly Applied to the Facts of This Case Where the Evidence of Guilt Was Overwhelming

Although the present case was a circumstantial evidence one, the evidence of the guilt of petitioners was overwhelming. Briefly, the evidence which is set forth at length under the statement of the case shows that petitioners were the last people seen in the bar with the victim; persons resembling the petitioners were seen with the victim who was closing the bar on the night of the murder, that the victim and the place where he tended bar was the subject of a robbery, that the victim's body was found in an open ditch with bullets wounds in the head made by a gun of a caliber

purchased by one petitioner; that blood of the victim's type was in petitioner's car and on their clothes and fibers from the victim's shoes matched those found in the car; that hairs matching those of the victim were found in the car; that red paint on the car's floor mat came from the victim's shoes; that a check signed by Mrs. Chapman bearing a stamp "refer to maker" was by the scene of the body, and that one petitioner (Teale) told a fellow prisoner that the other petitioner (Chapman) committed the murder.

With respect to the application of the California harmless error rule to the comments made by the prosecution in argument (to which no objection was raised at the time of trial) [16] the California Supreme Court stated in its opinion reported at 63 Cal.2d 178, 196–7, 45 Cal.Rptr. 729, 404 P.2d 209:

> "As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury, commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the

[16] Admittedly the case was tried prior to *Griffin* and had such objections been made they would probably have been overruled under existing California law.

shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provisions (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and 'that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.'

"The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteenth Amendments (*Griffin* v. *California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judg-

ment of conviction. (*People* v. *Bostick*, 62 Cal.2d 820, 823–827 [44 Cal.Rptr. 649, 402 P.2d 529].)

"It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instruction on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants were

not disposed to question the truth of the facts asserted by the prosecution's witnesses.

"We are therefore of the opinion that in the absence of the erroneous comments and instruction a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale."

By directing the jury's attention to the self-evident facts in the case at bar did the prosecution so materially affect petitioners' rights that a fair trial was denied? It is submitted that the answer is no. The jury was obviously aware of the fact that no explanation had been made of the evidence presented and no refutation of such evidence adduced. Some of this evidence certainly could have been refuted by testimony of and from other individuals than the petitioners themselves if it had not been true. Further, petitioners in accordance with California law were given the full advantage of discovery proceedings which meant they had virtually all of the material sought to be produced by the prosecution available to them prior to trial. The prosecution's case was not dependent upon words elicited from the petitioners' own lips. On the contrary, the prosecution case was developed entirely by independent witnesses and the inferences to be drawn from their testimony. Thus any question of comparison between this type of case and one that is based upon an improperly admitted confession is not correct. It would appear that the majority of the com-

ment complained of went to the strength and weight of the evidence produced by the prosecution and the failure of the defense to produce any evidence contradictory thereto. (*Hood* v. *United States* (10th Cir. 1932) 59 F.2d 153; *United States* v. *Johnson* (4th Cir. 1964) 337 F.2d 180, 203 cert. granted, 379 U.S. 988 and reversed on other grounds, 383 U.S. 169, 15 L.Ed. 2d 681, 86 S.Ct. 749; *State* v. *Perkins* (Mo. 1964) 382 S.W.2d 701, 706).

In other words, is there to be such a thing as permissible "indirect comment" or is even comment generally to be proscribed? (Cf. *Commonwealth* v. *Miller,* 205 Pa. Super. 297, 208 A.2d 867, 869; *Wood* v. *State,* 372 S.W.2d 896 (Tex.Crim.App. 1964); *State* v. *Chasteen,* 228 S.C. 88, 88 S.E.2d 880, 886; *Gargotta* v. *United States* (8th Cir. 1935) 77 F.2d 977; *State.* v. *White,* 247 La. 19, 169 So.2d 894, 901 (1964).)

In determining whether the comment is prejudicial to a defendant even in cases prior to *Griffin* where states by their own statutes or case law had prohibited comment, various tests had been applied. Courts have considered the directness or indirectness of the reference to a defendant's silence, the context in which the comment was made, the effect of any curative instructions, and, most importantly, how clearly the guilt of the defendant was shown (Vol. XL Tulane Law Review pp. 409–418).

As is apparent in the case at bar, the test used by the California courts in determining error is whether in the absence of such error and in the light of the

entire record it is reasonably probable or reasonably possible that a result more favorable to the defendant would be reached. (See cases cited footnote 11 *supra.*)

It should be noted that the permissible comment sanctioned by the California courts at the time in question and before this Court's decision in *Malloy* v. *Hogan, supra,* was extremely limited in scope. If, therefore, the petitioners at that time felt the comment was beyond the scope of the limited comment rule, it would appear an objection certainly should have been raised in the California courts. This they failed to do and in no way sought to urge it as error prior to the decision in *Malloy* v. *Hogan, supra.* Here the limited comment was directed to an evaluation of the prosecution evidence which the petitioners did not explain or deny. While the Constitution does afford to a defendant the right to remain silent, it cannot shield him from the evidence against him or the compulsion which it generates.

Any attempt by petitioners to cast the blame as to petitioner Chapman not taking the stand because of her nervous condition on the delay in the trial is certainly not supported by the record. The majority of the delay was occasioned by the endeavor of the state courts to accord to petitioners the fair and impartial trial to which they were entitled and the further machinations by both petitioners to obtain separate trials. (See footnote 1, *supra.*) The Fifth Amendment was never enacted nor has it been interpreted as a device to shore up the excessively timid and nervous criminal

defendant. It was enacted to protect against and prevent the use of compelled testimony and statements. There was not one of these produced in this trial as clearly appears from the opinion of the California Supreme Court and the further action of the petitioners in at no time seeking to raise such a question in the trial court. As to these points it appears that petitioners' counsel is attempting to smuggle into this proceeding subsidiary questions which were rejected by this Court and he is engaging in the same tactics for which he was taken to task by this Court in *Irvine* v. *California* (1953), 347 U.S. 128, 98 L.Ed. 561, 74 S.Ct. 381.

The prosecutor in the comments set forth at length in petitioners' brief did not tell the jury that they could infer petitioners' guilt from either his or her failure to testify and had this been done, it would have constituted error under prior California law. (*People* v. *MacCagnan,* 129 Cal.App.2d 100, 113–14, 276 P.2d 679, 688).

For example, the comment with relation to the purchase of guns (RT 1808) related to the fact no evidence was produced which showed which gun was purchased first. Independent evidence had been produced that petitioner Chapman had purchased guns in Reno, Nevada, prior to the killing and in fact at the time of his arrest, petitioner Teale had one of those loaded guns upon his person. Could this comment or lack of it change the result of the case? It is apparent that it could not. So too with relation to the com-

ment on the particular type of gun used in the killing (RT 1809). A gun similar to the type purchased was introduced in evidence but the actual gun used in the killing was not found. Evidence was produced that Mrs. Chapman did purchase a gun of that type in Reno prior to the killing. Patently the disposition of this article was within the knowledge of petitioners and if its disposition had been accidental or otherwise evidence could have been introduced to rebut this fact. It can hardly be urged that comments of this type which are addressed to the weight of the prosecution's evidence are to be equated with a presumption of guilt arising from a defendant's failure to testify or a presumption of guilt arising solely from that fact.

Comments as to the factual evidence at the scene of the killing (RT 1822) show that at that time the prosecutor specifically directed the jury's attention to the petitioners' privilege not to testify but that an adverse inference could be drawn from their failure to explain any facts or details within their knowledge.

Comments were made as to the motive of the killing due to the financial distress of the petitioners at that time (RT 1824–1825); the reason for petitioner Chapman buying two guns in Reno (RT 1826–1827); the petitioners' presence at the scene of the robbery (RT 1827–9); the amount of liquor they were consuming that evening (RT 1838); the question as to which of the two petitioners fired the fatal shots (RT 1840–1); the use of the false registration at the motel shortly after the killing (RT 1844–5); the meaning of

the letter written by Mrs. Chapman after the killing (RT 1848–9); the fact that petitioner Teale had a loaded gun with him at the time of his apprehension which was purchased by petitioner Chapman in Reno (RT 1854–5); petitioner Teale's comments to the officers at the time of his apprehension (RT 1855); the position of the victim at the time of the killing (RT 1860–1861); the blood found on the clothing of Mrs. Chapman (RT 1861–1862); the sending of clothing to Mrs. Smith by petitioners (RT 1861–2); which clothing was sent (RT 1863–4); the fact that no different version of the facts had been presented by petitioner Teale (RT 1881); the blue knit dress similar to the one worn by Mrs. Chapman at the time of the killing (RT 1882–3); the story that Mrs. Chapman told the doctor who examined her and that this did not constitute evidence (RT 1883, 1886); her conflicting statements as to her whereabouts at the time of the killing (RT 1889); the difference in statements given to Dr. Scheuerman and Dr. Winkler (RT 2108–2109); the argument between petitioner Teale and petitioner Chapman (RT 2115, 2116); motive for the robbery (RT 2256); who did the shooting (RT 2256–57, 2258–2259); the background of petitioners (RT 2288).

If we assume that no comment had been made in the case at bar would the outcome have been changed? Would not the jury have been faced with exactly the same questions? What evidence disputed the case presented by the prosecution which demonstrated the guilt

of the petitioners beyond a reasonable doubt? There was none.

This was not a case in which the facts were sharply disputed. On the contrary, it was one in which the prosecution bore the entire burden of proof separate and apart from the use of any statements improperly obtained from either petitioner. No statement sought to be complained of now was urged as misconduct by the defense at the time of the trial. Instead opposing counsel sought to explain away the prosecution's evidence; counsel for petitioner Teale on the ground that his connection with the offenses was not proved and counsel for petitioner Chapman on the ground that she was unable to have the necessary intent to commit the crimes charged.

It is apparent as found by the California Supreme Court that the comments above referred to were addressed to the weight and sufficiency of the evidence and imposed upon petitioners no other burden than the uncontradicted evidence of their guilt imposed.

They were not compelled to speak. Their failure to adduce evidence in their behalfs which contradicted that of the prosecution was apparent to the jury. There was no presumption of guilt based upon their failure to take the stand but when the evidence contradictory to that of the prosecution was solely within their knowledge it could be inferred that if such evidence had been produced it would have been adverse to them. Such reasoning was neither new nor novel. The comments addressed to it did not render their trial a farce nor deprive them of an essentially fair

trial which the state courts did accord them. It was not reasonably possible that the comments contributed to their conviction.

Respondent therefore submits that the application of the state harmless error rule to the case at bar was proper and that the judgment in no manner resulted in a denial of due process which infected the proceedings of the state court.

CONCLUSION

It is respectfully submitted that the judgment of the state court should be affirmed.

Respectfully submitted,

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